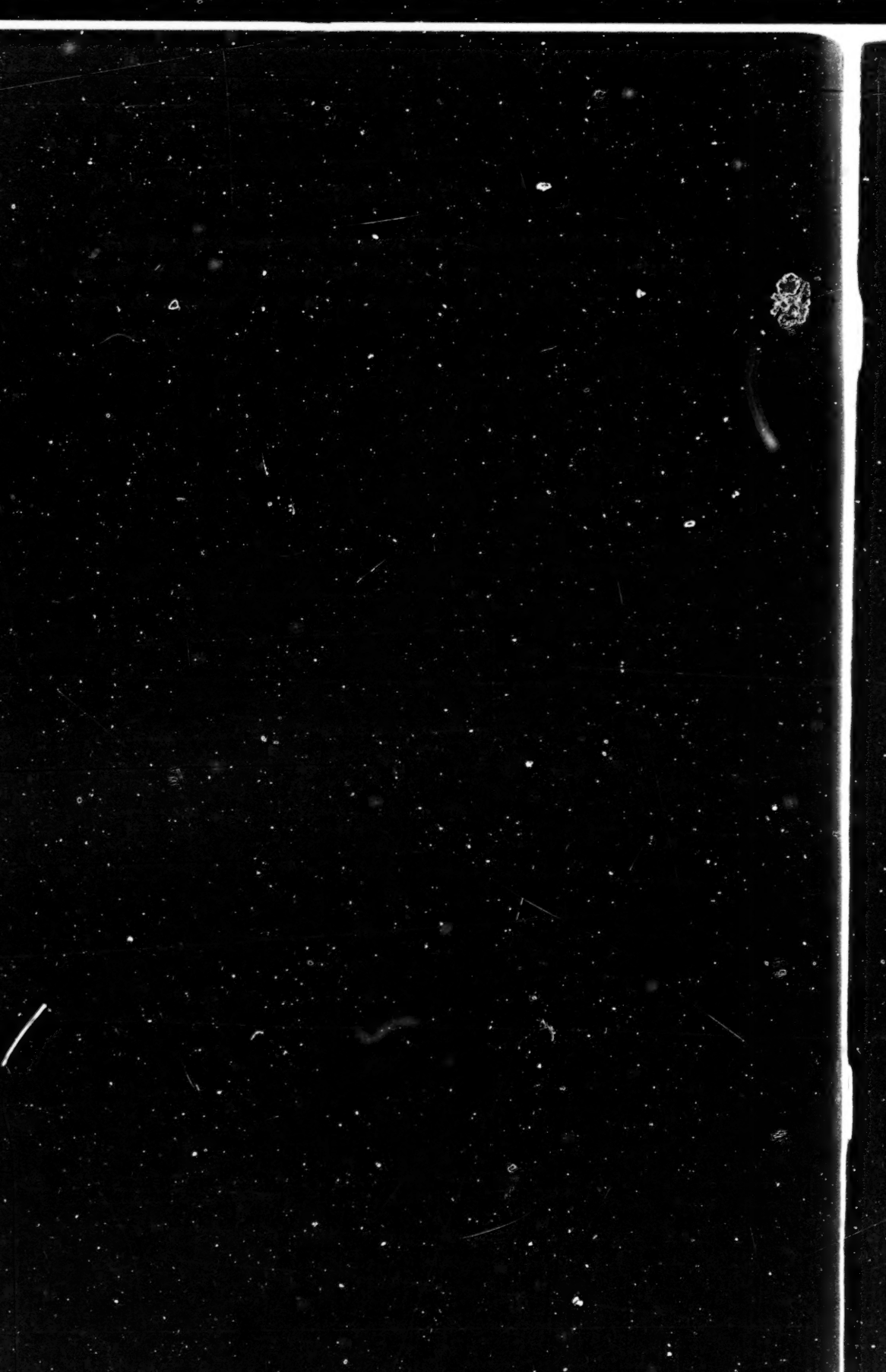

IN THE

Supreme Court of the United States

NO. ~~69-84~~ 70-5055

RAYMOND SMITH and
MELVIN McCLAIN,

Petitioners,

v

STATE OF FLORIDA,

Respondent.

BRIEF OF THE RESPONDENT

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OTHER AUTHORITY

QUESTION PRESENTED

The sole issue before the Court is whether Florida Statute, § 856.02, --- wherein it proscribes the act of wandering or strolling around from place to place without any lawful purpose or object,"--- fails to proscribe an ascertainable standard of criminal conduct as required by the Due Process clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

"The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[1]

Resolution of the question of whether the challenged provision of Florida's vagrancy statute is "void for vagueness", and thus violative of constitutional due process requirements of notice, hinges on whether that portion of the vagrancy statute complies with the forgoing principle.

The State of Florida respectfully yet firmly maintains that the challenged portion of the State's vagrancy law is constitutionally sound: that the statute adequately and specifically describes the acts prohibited, thus complying with due process requirements of notice.

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1. United States v Harriss, 347 US 612, 617, 98 L. ed 989, 74 S.Ct. 808; Palmer v City of Euclid, _____ US _____, No. 143, May 24, 1971(9Cr.L.R. 3175).

POINT I

MEN OF ORDINARY INTELLIGENCE NEED NOT GUESS OR DIFFER AS TO THE MEANING OF THE CHALLENGED PROVISION IN FLORIDA'S VAGRANCY STATUTE.

Necessarily, when a man of ordinary intelligence wanders or strolls about he does so with some objective or purpose in mind. His purpose for strolling may be only to exercise his legs, stimulate blood circulation, and foster good health. One's reason for aimlessly driving his automovile around from place to place may be to "find his bearings", to seek adventure in unknown places, or simply to view the scenery. The objective of a man's walk may be to wander aimlessly afoot, from place to place, alone, thinking. And one's reason for movement may be specifically to go from one location to another. And the purpose may change from one moment to the next. But, regardless of the specific objective at any particular point in time, when a person wanders around he does in fact have an objective. And Florida's vagrancy statute makes the wandering or strolling about itself unlawful, when that objective or purpose is an unlawful one.

Florida Statute, § 856.02, proscribes:

"...wandering or strolling around from place to place without any lawful purpose or object..."

The law does not prohibit wandering and strolling about without any purpose, rather it proscribes wandering or strolling about without any lawful purpose. The distinction is significant. When one wanders or strolls around he necessarily does have some purpose, and it is only when that purpose is not a lawful purpose that the statutory provision under consideration is applicable. CF. Johnson v Florida, 391 US 596, 20 L.ed 2d 838.

It is no answer to the foregoing argument to suggest that a person may be senile or insane --- wandering around with in fact no purpose whatsoever --- because the vagrancy statute does not address itself to this type of conduct. All criminal laws are predicated on volitional conduct. See: Powell v Texas, 392 US 514, 20 L.ed 2d 1254, 88 S.Ct. 2145; and R. Perkins, Criminal Law, at 650-651 (1957). The vagrancy statute under consideration is no exception.

In Headley v Selkowitz(Fla1965) 171 So. 2d 368, the Florida Supreme Court examined a municipal ordinance, providing that one who is found standing, loitering or strolling any place in the city and is not able to give a satisfactory account of himself, or who is without lawful means of support, is guilty of disorderly conduct. The Supreme Court of Florida held the ordinance invalid because it was too vague. In its opinion the court

also discussed Florida Statute, § 856.02, observing:

> "Such statutes and ordinances should be applied cautiously and sparingly and only in the most obvious and aggravated cases. Persons should not be charged with vagrancy unless it is clear they are vagrants of their own volition and choice. Innocent victims of misfortune ostensibly appearing to be vagrants, but who are not such either by choice or intentional conduct should not be charged with vagrancy."(emphasis added) Headley v Selkowitz, supra, at 370.

[In passing, note the similarity between the municipal ordinance ruled unconstitutionally vague in Headley v Selkowitz, supra, and the municipal ordinance ruled impermissibly vague by this Court in Palmer v City of Euclid, supra.]

What is the alleged insurmountable problem in a citizen's knowing what is a "lawful purpose or object?" It seems apparent that the average citizen who has any regard for what is lawful vel non, and who desires to avoid the law's proscription may do so. State v McGorvey(Minn1962) 114 NW 2d 703. Indeed, the term is no more vague than numerous others upheld by this Court: Adderly v Florida, 385 US 39, 17 L.ed 2d 149, 87 S. Ct. 242, reh. den. 385 US 1020, 17 L.ed 2d 559, 87 S.Ct. 698(malicious or mischievous trespass); Tinsley v City of Richmond(Va.1961) 119 SE 2d 488, appeal dismissed for want of

substantial federal question, 368 US 18 (1961) (loitering in public street; attacked as vague and beyond police power); Beauharnais v Illinois, 343 US 250, 96 L.ed 919, 72 S.Ct. 725(exposing citizens to derision or obloquy); Boyce Motor Lines, Inc. v United States, 342 US 337, 96 L.ed 367, 72 S.Ct. 329; Kovacs v Cooper, 336 US 77-106, 93 L.ed 513 (loud and raucous noises); United States v Petrillo, 332 US 1, 91 L.ed 1877 (in excess of the number of employees needed); United States v Ragen, 314 US 513, 86 L.ed 383 (reasonable allowance); Old Dearborn Distributing Co. v Seagram Distillers Corp., 299 US 183, 81 L.ed 109 (in fair and open competition); Spróles v Binford, 286 US 374, 76 L.ed 1167 (shortest practicable route); Mahler v Ely, 264 US 32, 68 L.ed 549 (undesirable residents); Levy Leasing Co. v Siegel, 258 US 242, 66 L.ed 595 (unjust rent)

The Petitioners assert that tourists and retirees strolling in the Florida sunshine fall within the ambit of Florida Statute, § 856.02. Petitioners would have this Court believe that the challenged provision of the Florida vagrancy statute allows police officers to snare a tourist enjoying the sun and surf, or pounce upon an unsuspecting senior citizen in the course of his early morning constitutional.

Thousands of tourists and senior citizens unquestionably do wander about Florida every year. But they need not

guess or differ as to whether they are vagrants: because although they may have no expressly stated purpose or object in mind, neither the Florida Legislature nor its police and courts, or, indeed, the tourists and senior citizens themselves, have ever questioned that they do in fact have a lawful purpose or object. CF. Territory of Hawaii v Anduna (9thCir.1931) 48 F.2d 1711, holding unconstitutional a loitering statute which did not qualify the reason for, or reasonableness of, the loitering. Also, Palmer v City of Euclid, supra.

Petitioners can make this assertion only by changing the wording of the portion of the vagrancy statute at bar: by changing the phrase "without any lawful purpose or object" to read "without any particular and expressed purpose or object in mind." Neither the facts nor reason or plain old common sense would support Petitioners' proposition that Florida's vagrancy statute renders "strolling in the sunshine" a crime.

The basic principle, then, is that, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process", Connally v General Construction Co., 269 US 385, 391, 70 L.ed 325. The State of

Florida maintains that its vagrancy statute is crystal clear; even though the clarity of a crystal is not the standard applicable, for, as this Court itself has long recognized:

> "ew words possess the precision of mathematical symbols, most statutes must deal with unforseen variations in factual situations and the practical necessities of discharging the business of government inevitibly limit the specificity with which legislators can spell out prohibitions." Boyce Motor Lines, Inc. v United States, supra, at 340.

The difficulty comes not with the test, but with its application.

The difficulty with application of the vagrancy statute revolves around questions of proof of intent, i.e., of an unlawful "objective or purpose". However, problems concerning proof of a specific intent under this statute are no different than difficulties in proving specific intents such as are raised by many other criminal statutes: e.g., the crimes of breaking and entering to commit grand larceny, breaking and entering with intent to commit rape; on the crimes of larceny, burglary, forgery, uttering, and using the mails with intent to defraud, all being crimes which require proof of a special mental element or a specific intent. Bear in mind, though, that it is the constitutional

validity of the specific vagrancy provision at bar, and not difficulties of proof in administering the law, which is the issue before the Court.

POINT II

THERE ARE SEVERAL FACTORS PRESENTED IN PETITIONERS' BRIEF WHICH ARE IRRELEVANT TO ISSUES PROPERLY BEFORE THIS COURT IN THE CASE AT BAR.

It is important to note that the Petitioners have properly challenged only that segment of the vagrancy statute which prohibits "...wandering or strolling around from place to place without any lawful purpose or object..." Florida Statutes, § 856.02. The sole contention argued in their original petition to this Court was the issue of whether the specific portion of the vagrancy statute was so vague as to be violative of due process requirements of notice. Yet in the final segment of the Petitioners' Brief on the Merits they argue that the vagrancy provision at bar abridges constitutionally protected rights to travel and against unreasonable searches and seizures. These two new issues never were argued to, or considered by, the state courts of Florida in this case.

An examination of the Florida Supreme Court's opinion (Appendix, 42-44) affirmatively establishes these issues were not under advisement, and that in reaching its conclusion the Supreme Court of Florida was neither directly or indirectly considering these propositions now argued by Petitioners. Furthermore, a perusal

of the Petitioners' joint motion for a new trial(Appendix 37-38), and of their notice of appeal(Appendix 36), and, particularly of their assignments of error(Appendix 40-41) fails to reveal where the Petitioners ever presented these issues to the state courts of Florida in this case.

Once a case reaches the United States Supreme Court, review is limited to the specific federal questions which were raised in the state courts. Whitney v California, 274 US 357, 71 L.ed 1095; Wilson v Cook, 327 US 485, 496, 96 L. ed 793; Adler v Board of Education, 342 US 485, 496, 96 L.ed 517; State Farm Mutual Insurance v Duel, 324 US 154, 160-161, 89 L.ed 813. The Petitioners are precluded from raising new federal issues neither argued or considered below, even if the issues properly might have been raised in the state courts. See: Safeway Stores v Oklahoma Grocers, 360 US 334, 342, n.7, 3 L.ed 2d 1280. Since the Petitioners never presented either of these two federal questions to the state courts below, they have waived them as grounds for objection to the state's vagrancy statute. Henderson v Georgia, 295 US 441, 443, 79 L.ed 1530; Beck v Washington, 369 US 541, 553, 8 L.ed 2d 98.

The Petitioners go afield in another respect. Their Brief on the Merits contains a somewhat exhaustive, educational and entertaining, but nevertheless irrelevant, history of vagrancy legislation in medieval England. The fact that in medival England people who wandered from place to place were feared and regarded as criminals, and were severely punished by whipping, slavery or death is no more a reason to invalidate the present Florida vagrancy statute than is the fact that larceny, presently a crime in Florida, was punished by cutting one's hand off in medival England. Likewise, the fact that the English Parliament originally passed vagrancy legislation with the intent of keeping the freed surfs inside their parish or "home on the farm" is irrelevant. It hardly can be asserted by Petitioners that the Florida Legislature and Florida courts passed and construe the present vagrancy statute with that same intent in mind. [The intent of modern-day vagrancy statutes is discussed infra.]

Whether or not Florida's vagrancy statute was derived from the genre of early English vagrancy laws which were harsh in intent and punishment is not at issue. The history of Florida's vagrancy statute is not on trial. Its present status is: What the challenged section of Florida Statute, § 856.02, prohibits today in the State of Florida

and whether it is constitutionally over vague in doing so is the issue now before this Court. Acts proscribed by this and similar vagrancy statutes in the Country of England or the State of Florida in 1349, 1597, 1832, or 1907 are irrelevant.

Petitioners' brief is irrelevant to issues at bar in still another respect. The wording of present-day vagrancy statutes varies significantly from one jurisdiction to another, and the courts have invalidated or upheld them under attacks substantially different from the one presented in the instant case. For example, many states had statutes which condemned one who loathes, idles or liters on a public street, but without qualification as to the reason one is on the public street. The following cases cited by Petitioners condemned this type of statute: Soles v City of Vadalia (Ga.App 1955) 90 SE 2d 249 [not based on constitutionality]; Commonwealth v Carpenter(Mass1950) 91 NE 2d 153 [not vagueness; court distinguished and approved state vagrancy provision similar to instant one]; People v Diaz, 4 NY 2d 469, 151 F.Supp.658; and Ricks v District of Columbia (DC Cir. 12/23/68) 37 US L.W. 2367-68. The cases of Fenster v Leary(1967) 20 NY 2d 309, 229 NE 2d 426, and In re: Newborn(Cal.1950) 350 P.2d 116 [dealt with term"common drunkard"]

are equally inapplicable.

Not one of the numerous cases cited by Petitioners was demonstrated by them to have struck down a statute containing the same provisions as Florida's here challenged, on the grounds of unconstitutional vagueness.

POINT III

THE VAGRANCY PROVISION AT BAR IS A NECESSARY AND PROPER EXERCISE OF THE POLICE POWER.

Contemporary statutes which prohibit wandering about without lawful purpose or object are regulatory measures enacted to prevent crimes and promote community safety. CF. State v Finrow (Wash.1965) 405 P.2d 600. Although at common law the statutes may have sought to force the idle to work and to keep socially irresponsible persons from wandering about, today they are designed to prevent crimes. CF. Fonte v State (Tenn.1965) 373 SW 2d 445; 91 C.J.S., Vagrancy § 2 (c) (1955). With the modern sociological and psychological orientation on crime prevention in the first instance, as opposed to an emphasis on crime detection and punishment after the event, a properly adminstered vagrancy statute appears to be a more appropriate tool of good law enforcement practices today than ever before in history. Even contemporary legal authorities who are critical of certain provisions in modern vagrancy laws acknowledge that the laws, "serve a necessary purpose and remain an essential means by which law enforcement agencies discharge their primary function of preserving law and order and preventing the commission of crimes." Sherry, Vagrants, Rogues and Vagabonds - Old Concepts in Need of Revision, 48 Cal.L.Rev. 557,566(1966).

Perhaps reference to a hypothetical situation will demonstrate the statute's essential function as a tool of crime prevention. Police Officer John Law received information from a reliable informant often used in the past that Stanley Steal intends to rob the XYZ Liquor Store on the corner of First Street and Main, downtown Centerville, tomorrow night. Stanley Steal told the informant that he is going to "case the joint" tonight at 8:00 by walking past ths store four or five times, and this information is provided by the informant to Officer Law. He also is informed that Stanley Steal will be unarmed tonight, but intends to use a gun in performing the robbery the following evening.

By what theory of constitutional law or common sense is Officer Law to be prohibited from arresting Stanley Steal tonight for "strolling about without any lawful purpose or object?" Is the option of arresting the designing robber tonight instead of later when armed, to be denied the law enforcement officer? Is the officer constitutionally prohibited from using crime prevention rather than crime detection in this situation?

A correctly drawn and properly executed "Stop and Frisk" statute can be of no assistance in the matter. Officer Law

may have grounds for a "stop" --- and possibly even a "frisk" --- but with what charge can he arrest the man if not vagrancy? What other law can he properly use for crime prevention?

Present-day vagrancy provisions such as the one at bar clearly differ from earlier vagrancy law which condemned ecenomic or social conditions rather than volitional acts, and are a reasonable and essential exercise of the police power if our Constitution is to be understood to avoid unnecessarily restraining our police in crime prevention.

Practical experience in law enforcement and common sense in government demand that the rights of citizens implicit in a free society must be counter-balanced with the prospect that law enforcement officers will be forced to stand idle, immobilized by non-essential constitutional restraints, while night time prowlers and apparently resolute thieves or designing rapists stalk without restraint from place to place and neighborhood to neighborhood, from house to house and victim to victim. A balance must be recognized and the scales of justice should be read to sustain the statutory provision at bar.

CONCLUSION

In summary, because the challenged section of the Florida vagrancy statute is a necessary and reasonable exercise of the police power, which does not cause men of common intelligence to guess at its meaning, the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of the Respondent was mailed Honorable Phillip A. Hubbart, Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125, this ____ day of _____, 1971.

Nelson E. Bailey

NELSON E. BAILEY
Assistant Attorney General

of Counsel